1955

Clifton M. Bowden v. The Denver and Rio Grande Western Railroad Company : Brief of Respondent

Utah Supreme Court

Rawlings, Wallace, Roberts & Black; Brigham E. Roberts; Counsel for Respondent;

Case No. 8054

IN THE SUPREME COURT
of the
STATE OF UTAH

CLIFTON M. BOWDEN,

Respondent,

— vs. —

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, a corporation,

Appellant.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Numbers in parenthesis refer to pages of the record.

The parties will be referred to as in the Court below.

Defendant's brief does not adequately present the facts to assure a proper consideration of the correctness of the trial court's order in granting plaintiff a new trial. In several instances defendant misstates the testimony. We therefore feel it necessary to present the facts which are material to the instructions questioned and to an understanding of the case.

Plaintiff was employed by defendant as a brakeman, and on the 21st day of December, 1951 was performing the duties of a head brakeman on an eastbound freight train from Salt Lake City to Helper, Utah (10, 15).

At Soldier Summit, Utah is located the summit of mountains over which it was necessary to pull the train (118). From Soldier Summit to Helper is downgrade and in order to properly control the train it is necessary to set up what are known as retainers. These would be set up on about 35 cars immediately behind the engine. It was plaintiff's duty to perform this task. Plaintiff's train arrived at Soldier Summit in the early morning hours. It was dark. Another eastbound train was to pass the freight train. To accomplish this it was necessary to run the freight train into a passing track at Soldier Summit (14). Plaintiff would have to get out of the engine cab, where he was riding, and set up each of the 35 retainers. To save delay he started to climb down the gangway ladder on the south side so that as soon as the stop was made he could get off (15). As he stepped on the second step from the bottom his right leg, about half way between the ankle and knee, was caught by snow alongside the track (17). The engine was going between 4 and 5 miles an hour (18). As he stood on this ladder he was unable to see beyond the head end of the engine and could only see flying snow and steam (38, 63). The snow swept his feet from the ladder and he was dragged along for some little distance as he clung to the ladder. He was finally forced to let go (18). In describing the

snowbank, which had been responsible for his fall, plaintiff testified (20):

"Q. Now, as you were going back along there, did you make any observation of the condition of the snow along the side of the track?

"A. Yes, I did; I looked at the snowbank very closely.

"Q. Describe to the jury what you saw there, please.

"A. Well, my estimate of the snow was from three to four feet high, with a straight surface bank on it, which was right up ag'in the cars: couldn't get between it and the car. I walked on top of the snowbank, and was coming back, putting up retainers both ways.

"Q. Keep your voice up.

"A. Well, snow was very solid and hadn't—wasn't no temporary snow there; been there for several days in the way it was solid.

"Q. Did it look like it was drifting, also?

"A. No, it didn't.

"Q. Were there any marks on it you could tell?

"A. Yes, there was some marks in the bank of it.

"Q. What kind of marks?

"A. Well, which showed the side of the engine, or different parts of the engine was dragging.

"Q. Was what?

"A. Drug the bank, yes.

"Q. You walked back the 35 cars, then walked forward fixing the retainers?

"A. Yes."

As far as plaintiff knew, the tracks there were clear and he presumed that there was no close clearance and he relied upon that presumption (37, 70). The conductor testified that he would not expect an impairment of clearance to a man standing on the ladder of an engine in the position of plaintiff (R. 87).

The defendant operated snowplows for the purpose of clearing the tracks at Soldier Summit. One of the purposes of clearing the snow away from the tracks was to make sufficient clearance for men to ride on the side of the cars, and it was known that men worked along the south side of this passing track (124). While cleaning the track of snow it is necessary to pull in the wings of the plow to avoid some obstructions along the side of the track. In this particular case there was a battery box close enough to the track so as to require a pulling in of the wings (78, 81, 121, 123).

It was necessary to clean around switch stands and battery boxes with a bulldozer in order to afford sufficient clearance for men working on the trains (122, 123). The defendant knew that by pulling in the wings an area would be left where there would be insufficient clear-

ance to permit men to work on the trains with safety (124, 125). In sending the train through this passing track no warning was given to the men on the train that they could expect close clearance (128). As matter of fact, it was not necessary to send the train down into this area without giving a warning or until the snow had been safely cleared to permit the men to work in safety (125).

Defendant's Roadmaster, W. R. Thomson, was in charge of the work of cleaning snow from the tracks at Soldier Summit (114, 115).

There was no evidence that snow crews were working on the tracks at the time plaintiff was injured and no evidence that the bank of snow, responsible for plaintiff's injuries, was drifted snow.

The case was submitted to the jury upon the erroneous instructions and a verdict of "No Cause of Action" resulted.

STATEMENT OF POINTS RELIED UPON

POINT I.

THE TRIAL COURT ERRED IN GIVING TO THE JURY INSTRUCTION NO. 9.

1. *Master is charged with knowledge of conditions existing at place where he sends his servants to work and servant is not required to prove knowledge of unsafe condition.*

2. *Master is charged as matter of law with knowledge acquired by his servants and with knowledge of unsafe condition created by his servants.*

3. *Where defendant is charged with knowledge as matter of law, to instruct jury it must find existence of knowledge before it can find liability constitutes prejudicial error.*

4. *The giving of subdivision (2) of Instruction No. 9 constituted prejudicial error.*

5. *Contentions and authorities of defendant answered and analyzed.*

POINT II.

THE TRIAL COURT ERRED IN GIVING TO THE JURY INSTRUCTION NO. 10.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN GIVING TO THE JURY INSTRUCTION NO. 9.

One of the grounds upon which plaintiff sought recovery was that defendant failed to exercise reasonable care to furnish plaintiff a reasonably safe place to work.

Plaintiff requested an instruction on this subject, which the court in substance gave as its Instruction No. 6 (207):

> "If you find from a preponderance of the evidence that the defendant failed to use reasonable care to furnish plaintiff a safe place to work in

> that the defendant in clearing the snow from its tracks at Soldier's Summit failed to clean the tracks a sufficient distance to permit persons lawfully riding on the side of engines or cars to do so in safety and without coming in contact with the snow, then you are instructed that the defendant was negligent, and if you shall further find that such negligence proximately caused, in whole or in part, injuries to plaintiff, then you should return a verdict in favor of the plaintiff and against the defendant and award to plaintiff damages as in these instructions set forth."

Under this instruction the jury, to return a verdict for plaintiff, was required to find that defendant in clearing snow from its tracks failed to clear the tracks a sufficient distance to permit persons riding on the sides of engines to do so with safety and without coming in contact with the snow, and that such conduct was a failure to use reasonable care in furnishing to plaintiff a reasonably safe place to work. This is all a servant need prove in order to establish the liability of a master upon this ground.

At defendant's request, the trial court gave a further instruction upon this subject as its Instruction No. 9, which is set out at length on page 4 of the Brief of Appellant. Under that instruction before the railroad could be found negligent in failing to provide a safe place to work, the jury must find by a preponderance of the evidence that the railroad knew, or by the exercise of reasonable care should have known, that there was snow

or other substance near the track at the point of the accident. This added an element with which defendant was charged as matter of law and no jury finding was necessary thereon.

Under *Butz v. Union Pacific R. Co.*, (Utah), 233 P. 2d 332, a master is charged with knowledge of conditions existing in places where it sends its servants to work. Also in this case the unsafe condition was created by defendant's servants, including a roadmaster, and these servants had knowledge of the existence of the snowbank. Hence, defendant was charged as matter of law with knowledge of conditions there existing.

1. *Master is charged with knowledge of conditions existing at place where he sends his servants to work and servant is not required to prove knowledge of unsafe condition.*

In the last dozen years the Supreme Court of the United States has given a liberal construction to the Federal Employers' Liability Act and has been very careful to see that railroad workers are afforded protection under that Act. One of the cases within this period wherein the court addresses itself to the proposition of a safe place to work is *Bailey v. Central Vt. Ry. Inc.*, 319 U.S. 350, 352, 353, 63 S. Ct. 1062, 1063, 87 L. Ed. 1444. In setting forth the principles involved in this very important duty of a master, the court stated:

> "Sec. 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of

> its 'officers, agents, or employees'. The rights which the Act creates are federal rights protected by federal rather than local rules of law. * * * And those federal rules have been largely fashioned from the common law * * * except as Congress has written into the Act different standards. * * * At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. * * * As stated by this Court in the Patton case it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes, then, a demand of higher supremacy, and yet, in all cases it is a question of the reasonableness of the care, reasonableness depending upon the danger attending the place or the machinery.' * * * It is that rule which obtains under the Employers' Liability Act. * * * That duty of the carrier is a 'continuing one' * * * from which the carrier, is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent."

The court cited and relied upon the earlier case of *Kreigh v. Westinghouse, Church, Kerr & Co.*, 214 U.S. 249, 29 S. Ct. 619, 621, 622, 53 L. Ed. 984. The court in that case in describing this duty, stated:

> "The duty of the master to use reasonable diligence in providing a safe place for the men in his employ to work in and to carry on the business of the master for which they are engaged has been so frequently applied in this court, and is now so thoroughly settled, as to require but little reference to the cases in which the doctrine has been declared.
>
> * * *

> "Nevertheless, the duty of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character. As late as Santa Fe & P. R. Co. v. Holmes, 202 U. S. 438, 50 L. ed. 1094, 26 Sup. Ct. Rep. 676, it was declared: 'The duty is a continuing one and must be exercised whenever circumstances demand it.'"

That close clearance constitutes an unsafe place to work is established by the case of *Ellis v. Union Pac. R. Co.*, 329 U.S. 649, 67 S. Ct. 598, 599, 91 L. Ed. 572, wherein the court states:

> "* * * The nearness of the track to the building created an unsafe place for work."

In none of the foregoing cases is there any requirement that the jury find the master had knowledge of the dangerous condition of the premises in or onto which the master sent his servant to perform work. A moments reflection will give the underlying reason. A master undertakes to send his servant into a certain place to work. The master should determine and make inquiry about the conditions there in existence. If there is a dangerous condition existing it would be his duty to eliminate such condition, warn the servant of its existence, or refuse to permit the servant to go into the area. There is no reason why a master should be able to say that he was not aware of a dangerous condition existing in a place where he has sent his servant to perform a task which would be financially beneficial to the master.

This is more clearly true in the case at bar than in the ordinary case. Here was an obvious danger, a danger created by servants of the defendant in clearing snow from the tracks and leaving a bank of snow too close to the tracks for safety.

At one time it may be that the courts required a finding of either actual or constructive knowledge of dangerous conditions. We submit that is no longer the law. This change is recognized in a recent article found at 12 *F.R.D.* 13, entitled Federal Employers' Liability Act, and written by B. Nathaniel Richter and Lois G. Forer. At page 30 the authors state:

> "* * * Nevertheless, under the F.E.L.A., the unsafe condition of the car, locomotive, track, roadbed or premises may give rise to liability if the jury infers that such unsafe conditions caused the injuries complained of. Older cases required notice by the carrier of the unsafe condition, before allowing the jury to find negligence.
>
> "The duty to maintain a safe place is non-delegable and the carrier is responsible for any injuries resulting therefrom even though it had no control over the premises. The Supreme Court has recently held that the unsafe conditions are of themselves evidence of negligence and permit the case to go to the jury if causation might be inferred."

This Court has recognized that change in the recent case of *Butz v. Union Pacific R. Co.* (Utah), 233 P. 2d 332. In that case plaintiff was employed by defendant

as a switchman and was riding the lead end of a cut of cars being shoved by defendant on the tracks of the Denver Union Terminal Company, at Denver, Colorado. Baggage trucks were too close to the tracks to permit a man to ride in safety on the side of the car in the position of plaintiff. He was shoved into these baggage trucks and received injury. In stating the problem, this Court stated (p. 333):

> "As will hereinafter appear, the difficult question in this case is not whether the plaintiff was furnished a safe place in which to work, but whether defendant railroad should be held responsible for the conditions at the place of plaintiff's injury and the fact that the baggage trucks were misplaced too close to the tracks where plaintiff was required to perform his duties at the time he got hurt."

The Court directly held that in the situation of the *Butz* case defendant was charged with knowledge of the physical conditions existing in a place to which defendant sent its employees. The Court stated (p. 335):

> "Defendant maintains that there is no basis for either its actual or constructive knowledge of the condition of danger which existed here. The defendant is charged with knowledge of the physical conditions there existing including the tracks, platform, the baggage trucks and the method of their use and operation."

In addressing itself to the role of the employer in these cases the Court also stated (p. 336):

> "* * * The employer exercises exclusive choice both as to the place of work and control over safety factors. It is therefore not unreasonable to charge him with the duty of providing a safe place to work."

This case stands for the proposition that under the Federal Employers' Liability Act a servant is not required to prove that the carrier had actual or constructive notice of an unsafe condition at the place he is injured, and the presumption is that the carrier has notice since it controls places of work and the assignments which the employee must carry out.

The proof necessary to establish a safe place to work case is set forth as follows (p. 336):

> "This history, together with the language of the adjudicated cases, including the Wilkerson case itself, point to one inescapable conclusion: The Supreme Court of the United States says with unequivocal certainty that wherever a railroad employee under F.E.L.A. is injured in the course of duty and there is *any* evidentiary basis upon which reasonable minds could believe that reasonable care might have required additional safety measures which were not taken, and which contributed in whole or in part to cause the injury, the case should be tried to a jury."

There is no requirement here of knowledge. There was no testimony of any kind in the Butz case tending to show that defendant had any knowledge of the position of the baggage trucks. This court of necessity held knowledge was not a required part of plaintiff's case.

There are two propositions present in the case at bar, not present in the *Butz* case, which make the case at bar even a stronger case for plaintiff. In the *Butz* case the employee was sent to property of another and the employer was still charged with the responsibility of its condition, while in the case at bar the property upon which plaintiff was injured was the property of defendant carrier. Also, in the *Butz* case there could be no way of determining who placed the baggage trucks too close to the tracks and it was assumed the trucks were left by Terminal Company employees. In the case at bar the close clearance could only have been created by servants of the defendant.

See also: *Terminal R. Ass'n. of St. Louis v. Fitzjohn,* 165 F. 2d 473 (8 CCA); *Shiffler v. Pennsylvania R. Co.,* 176 F. 2d 368 (3 CCA); *Chicago, Rock Island & Pac. Ry. Co. v. Gill,* 217 F. 2d 195 (5 CCA); *Chicago, Rock Island & Pac. Ry. Co. v. Kifer,* 216 F. 2d 753 (10 CCA); *Williams v Atlantic Coast Line R. Co.,* 190 F. 2d 744 (5 CCA).

In *Shiffler v. Pennsylvania R. Co.,* supra, a directed verdict for defendant was reversed although the court disregarded evidence of notice to the company of the conditions alleged to render the place of work unsafe.

In *Chicago, Rock Island & Pac. Ry. Co. v. Kifer,* supra, the plaintiff's action was under Federal Employers' Liability Act and he sought recovery on the principle

of failure to furnish a safe place to work. The facts are almost identical with the *Butz* case and a verdict for plaintiff was affirmed. There was no proof of knowledge.

We submit that under the foregoing authorities defendant was charged with knowledge of conditions existing at Soldier Summit. As will hereinafter appear, it was prejudicial error to permit the jury to speculate upon whether or not defendant had such knowledge.

2. *Master is charged as matter of law with knowledge acquired by his servants and with knowledge of unsafe condition created by his servants.*

The defendant's roadmaster was in charge of the work of cleaning snow from the tracks at Soldier Summit (114, 115), and he knew that it was necessary to clean around the switch stands and battery boxes with the bulldozer in order to afford sufficient clearance for men working on the trains (122, 123). He also knew that by pulling in the wings of the snow plows an area would be left where there would be insufficient clearance to permit men to work on the trains with safety (124, 125). He testified that one of the purposes of clearing the tracks in this area was to make sufficient clearance for men to work along the sides of trains (124). The testimony of plaintiff is the only testimony concerning the type of snow which drug him from the engine. His testimony is set out in detail under the Statement of Facts. Suffice it to say here he testified the snow appeared to have been there for several days and it was not drifted snow.

We here have conclusive and positive evidence that the employees of defendant, under the supervision of its Roadmaster Thomson, created the close clearance by pulling in the wings of the snow plow and not clearing it a sufficient distance for the safety of men riding the sides of trains. The cases clearly hold that a master is charged with the knowledge of his servants. It seems almost trite to say it is only through servants that this defendant railroad corporation could acquire knowledge of conditions at Soldier Summit on this particular occasion. The roadmaster knew of the conditions existing at Soldier Summit, and under the authorities this is the knowledge of defendant. *Field v. Northwest Steel Co.,* 67 Or. 126, 135 Pac. 320; *Rogers v. Portland Lumber Co.,* 54 Or. 387, 103 Pac. 514; *Scherer v. Danziger,* 178 Cal. 253, 173 Pac. 85; *Hennig v. Carstens Packing Co.,* 136 Or. 267, 297 Pac. 1055; *Jackson v. Yak Mining, Milling & Tunnel Co.,* 51 Colo. 551, 119 Pac. 1058.

The close clearance existing at Soldier Summit was created by defendant. This being so, it is charged with knowledge of the condition.

In *Oklahoma Gas & Electric Co. v. Oliphant,* 172 Okl. 635, 45 P. 2d 1077, 1081, the deceased was an electrician who was sent to repair a light switch. He climbed a pole and was electrocuted. Plaintiff introduced testimony that the electrical system at that point was improperly constructed. In holding defendant charged with knowledge of the condition of this system the court stated:

> "Where the employer is guilty of negligence as a matter of law in creating a dangerous situation, knowledge of the existence of such situation is imputed to him and it is his duty to notify his employee of such dangerous situation. 'It is the duty of the master to warn his employees of dangers arising out of the progress of the work which are known to him and unknown to them, and this is a nondelegable duty.' Thurlow et al. v. Failing et al., 133 Okl. 277, 272 P. 368, 372. And, under such circumstances, we see no reason why the degree of skill possessed by the employee should have any bearing on the question, in the absence of notice."

We submit defendant was charged with the knowledge of its roadmaster and other employees in the area, and if the clearance was close enough to catch a person on the side of the engine, it was charged with knowledge of that condition through its servants.

3. *Where defendant is charged with knowledge as matter of law, to instruct jury it must find existence of knowledge before it can find liability constitutes prejudicial error.*

The giving of this instruction added materially to the burden of plaintiff and tended to confuse the jury. The instruction submitted by plaintiff made no such requirement. It provided that before plaintiff could recover the jury must find defendant created an unsafe condition. In addition to the defendant creating an unsafe condition it was necessary under this added instruction to find that defendant had knowledge of the condition. This certainly was error.

In *Eleganti v. Standard Coal Co.*, 50 Utah 585, 168 Pac. 266, 267, an action was brought for the death of a miner. The evidence was undisputed that explosive gas had been found in the mine more than two months before the fatality. The court instructed that it was a mine known to generate such gas. This instruction was correct and the court held that a trial court should not leave an undisputed fact to be determined by the jury, and stated:

> "* * * The fact that explosive gas was found in the mine was therefore an undisputed question, and, that being so, no finding to the contrary could have been truthfully made by the jury. Where a finding with respect to any essential fact must necessarily be in the affirmative, it is ordinarily the duty of the court to declare the fact, and not permit the jury to assume that they may find the fact contrary to the undisputed evidence."

In *Thompson Union Fisherman's Co-Op Packing Co.*, 118 Or. 436, 235 Pac. 695, an action was brought to recover for the death of plaintiff's daughter. She was employed by defendant and was killed while on an elevator defendant had left in charge of a minor. The jury was instructed that defendant could not be liable if deceased was in the elevator and attempted to operate it without the knowledge of agents of defendant. This instruction was held prejudicial error because the deceased daughter was on the elevator at the invitation of the minor, and defendant was of necessity charged with the knowledge its servant had acquired.

We submit that the giving of this instruction was prejudicial error.

4. *The giving of subdivision (2) of Instruction No. 9 constituted prejudicial error.*

Before plaintiff could recover subdivision (2) of this instruction required that the jury find (1) defendant had a reasonably sufficient time to eliminate the snow, (2) could reasonably have eliminated it, and (3) defendant failed to do it.

Here again we have defendant's request piling element upon element, thereby increasing without end the burden placed upon plaintiff.

The jury could find that defendant did not have time to eliminate the snow before plaintiff's train went through the passing track but because of the unsafe condition of the area reasonable care had not been exercised to furnish a reasonably safe place to work. Defendant did not need to send its train into this area at the precise moment which it did. It could have waited until the area had been made safe and in failing to do this it was negligent.

The trial court set forth three necessary factors to find under the subdivision. The first and second are the same, though worded differently. The trial court following defendant's request required both. Why? This was error and confusing to the jury.

We submit that subdivision (2) of this instruction was erroneous and giving it to the jury was prejudicial.

5. *Contentions and authorities of defendant answered and analyzed.*

On page 10 of its brief defendant asserts the jury undoubtedly found plaintiff's foot encountered "newly drifted snow that had accumulated during the early morning hours along the side of the track." There is no evidence to support any such finding. The only evidence relating to the snowbank was that of plaintiff and there was no evidence any drifted snow caught plaintiff.

Defendant contends the jury could very reasonably have found defendant did not know of the existence of an alleged close clearance and had no reasonable opportunity to correct this condition. It contends the close clearance could have been created by drifted snow. It contends this was its theory.

The difficulty with defendant's contentions above outlined is that the instruction is not limited to drifted snow close clearance. The instruction states unequivocally that in order for plaintiff to recover under any or all conditions the jury must find as one of the elements that defendant had actual constructive knowledge of the close clearance. This is not true if that close clearance were created by defendant through its servants by pulling in the wings of the snowplow and leaving the snowbank too close to the engine for an employee to ride safely

on its side. This instruction created such a confusion when compared with Instruction No. 9 that a new trial must be given so that a jury may be clearly and correctly instructed on this very vital subject.

The authorities cited by defendant, with the exception of the *Butz* case, supra, are not helpful.

In *O'Mara v. Pennsylvania R. Co.*, 95 F. 2d 762 (6 CCA), plaintiff had charge of a railroad station and jumped from baggage trucks to the platform lighting on a square headed bolt. The station platform was between two streets and served as a sidewalk for the public. How long the bolt had been there and by whom it had been placed could not be determined from the evidence. The court expressly distinguished the situation there presented from one where the accident occurred upon company property and to which only employees of defendant would have access. This latter situation is the one presented in the case at bar.

Hatton v. New York, N. H. & H. R. Co., 261 Fed. 667 (1 CCA) was decided in 1919, and does not follow the rule of the later cases. In that case ice on a station platform caused a plank to slip. There was no evidence that any agents of the defendant had knowledge of its existence. In the case at bar there was undisputed evidence that defendant had knowledge of the snow and of the fact that close clearance was left by pulling in the wings of the snowplow.

Southern Ry. Co. v. Stewart, 115 F. 2d 317 (8 CCA), involved an entirely different situation. There the arm of the deceased person was crushed between two couplers. The injuries were fatal. The jury was instructed that in the absence of evidence that deceased did not use the pin lifter mechanism on the coupler the law presumed he did use it before going between the ends of the cars. This instruction was held error. The case is not even remotely helpful here.

In *Schilling v. Delaware and H. R. Corp.,* 114 F. 2d 69 (2 CCA), plaintiff brakeman caught his foot in ties and a car ran over his leg. The ties were two rails welded together. Ordinarily the space between these rails was filled with cinders, but in this particular case there were no cinders there. The court held that defendant's only duty was adequate inspection and timely repair. This is distinguished from the case at bar in that here the condition was created by the activities of defendant, while in the *Schilling* case it was not. Also, there the court fails to give effect to the repeal of the fellow servant doctrine and held that knowledge of the trainmen who did not do track maintenance work was not equivalent to notice to defendant. In the case at bar, the roadmaster and employees under his supervision, who would have knowledge of this condition at Soldier Summit, were engaged in track maintenance work. A recent case directly contrary to this case is *Chicago, Rock Island and Pac. R. Co. v. Gill,* 217 F. 2d 195; *Saun-*

ders v. Longview, P. & N. Ry. Co., 161 Wash. 280, 296 Pac. 835, was decided in 1931, and was based upon the proposition that the plaintiff assumed the risk, a doctrine long since discarded by the Federal Employers' Liability Act.

POINT II.

THE TRIAL COURT ERRED IN GIVING TO THE JURY INSTRUCTION NO. 10.

Another ground upon which plaintiff sought recovery was the negligent failure of defendant to warn plaintiff of the insufficient clearance between the cars or engine and the snowbank. At plaintiff's request, the court instructed the jury on this subject in the second paragraph of its Instruction No. 7 (208):

> "If you shall find from a preponderance of the evidence that the defendant failed to warn plaintiff that there was insufficient clearance between the cars or engine and the snowbank at the side of the tracks at Soldier's Summit, and that such failure constituted negligence, and that such negligence proximately caused, in whole or in part, injuries to plaintiff, then you should return a verdict in favor of the plaintiff and against the defendant."

All of the elements required are set forth in this paragraph of the instruction. The court in giving Instruction No. 10, set forth at length on pages 4 and 5 the Brief of Appellant, adds a new and additional element necessary for plaintiff to establish in order to

recover. Subdivision (2) of this instruction requires that the jury find the railroad knew, or by the exercise of reasonable care should have known, of the insufficient clearance and should reasonably have known that it created an appreciable risk of harm to railroad workers. According to the authorities cited under Subdivision (2) of Point I, defendant was charged as matter of law with knowledge acquired by its servants. Its servants working in the area and clearing the tracks of snow would of necessity know about close clearance left by them. In 2 *Shearman and Redfield on Negligence* (Rev. Ed.) p. 52, Sec. 213, the rule applicable to this point is stated as follows:

> "It is the duty of the master to use reasonable care to provide for the servant, so far as the work at which he is engaged will permit, a reasonable safe and proper place in which to do his work, and to that end, if the place may become dangerous by reason of perils arising from the doing of other work pertaining to the master's business, different from that in which the particular servant is engaged, to give him such warning of the additional dangers as will enable him, in the exercise of reasonable care, to avoid them, or to guard himself against them."

Subdivision (2) of Instruction No. 10 requires plaintiff to prove not only that plaintiff knew there was insufficient clearance, but also that it "should reasonably have known that it created an appreciable risk of

harm to railroad workers." No jury finding should be required on this proposition. The evidence was uncontradicted that defendant's servants engaged in cleaning snow knew that trainmen would use the south side of the eastbound passing track (123, 124) and that one of the purposes of making sufficient clearance was to permit trainmen to work along the south side in safety (124). It follows that if there was insufficient clearance then there was appreciable risk of harm to railroad workers and no jury finding was necessary on this latter proposition.

We submit that in the particulars stated the giving of this instruction constituted prejudicial error.

CONCLUSION

The trial court who gave these instructions determined that he was in error in requiring the added element of actual or constructive knowledge, particularly in the instruction given at defendant's request relating to the principle or doctrine of safe place to work.

We submit that the trial court was correct in its analysis of this instruction and correct in its conclusion that the instruction was erroneously given.

We respectfully submit that the order of the trial court granting to plaintiff a new trial in this case should be affirmed and the case returned to the District Court for the purpose of permitting plaintiff to try his case before a jury properly and correctly instructed.

Respectfully submitted,

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RECEIVED ..... copies of the within Brief of Respondent this ..... day of February, A. D. 1954.

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